(1) Bridgestone/Firestone, a subsidiary of foreign owned Bridgestone Corp., has recently announced its decision to hire permanent replacement workers displacing more than 2,000 American workers;

(2) this action may result in the largest permanent displacement of workers in over a decade;

(3) the practice of hiring permanent replacement workers is devastating, not only to the replaced workers, but also to their families and communities;

(4) the position of management of foreign owned Bridgestone/Firestone appears to be that they cannot compete with their American owned competitor, Goodyear, if they provide wages, benefits, and conditions of employment benefits patterned after those provided by Goodyear;

(5) hiring permanent replacement workers is illegal under the laws of the parent company's own country; and

(6) most of the United States' major trading partners, including, Japan, Germany, France, and Canada recognize that using permanent replacements is bad business and bad public policy.

(b) SENSE OF THE SENATE.—It is the sense of the Senate that—

(1) Bridgestone/Firestone should reconsider its decision to hire permanent replacement workers and return to the bargaining table and bargain in good faith with the United Rubberworkers of America, the representative of their employees; and

(2) the Clinton Administration, working through the appropriate diplomatic channels and using the appropriate trade negotiations, should impress upon the parent company's home government the concern of the United States over this matter and seek their assistance in getting Bridgestone/Firestone to reconsider their decision.

AUTHORITY FOR COMMITTEES TO MEET

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS

Mr. DOLE. Mr. President, I ask unanimous consent that the Committee on Banking, Housing, and Urban Affairs be authorized to meet during the session of the Senate on Friday, January 6, 1995, to conduct a hearing to examine issures involving municipal, corporate and individual investors in derivative products and the use of highly leveraged investment strategies.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON GOVERNMENTAL AFFAIRS

Mr. DOLE. Mr. President, I ask unanimous consent on behalf of the Governmental Affairs Committee for authority to meet on Friday, January 6 for a markup on S. 1, unfunded mandates.

The PRESIDING OFFICER. Without objection, it is so ordered.

ADDITIONAL STATEMENTS

PROPERTY RIGHTS LITIGATION RELIEF ACT

• Mr. HATCH. Mr. President, on January 4, 1995, I introduced S. 135, the Property Rights Litigation Relief Act of 1995. Because of the great interest shown in the bill, I ask that it be printed in the RECORD at this point.

The bill follows:

S. 135

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Property Rights Litigation Relief Act of 1995''.

SEC. 2. FINDINGS.

The Congress finds that—

(1) the private ownership of property is essential to a free society and is an integral part of the American tradition of liberty and limited government;

(2) the framers of the United States Constitution, in order to protect private property and liberty, devised a framework of Government designed to diffuse power and limit Government;

(3) to further ensure the protection of private property, the fifth amendment to the United States Constitution was ratified to prevent the taking of private property by the Federal Government, except for public use and with just compensation;

(4) the purpose of the takings clause of the fifth amendment of the United States Constitution, as the Supreme Court stated in Armstrong v. United States, 364 U.S. 40, 49 (1960), is ''to bar Government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole'';

(5) the Federal Government, in its haste to ameliorate public harms and environmental abuse, has singled out property holders to shoulder the cost that should be borne by the public, in violation of the just compensation requirement of the takings clause of the fifth amendment of the United States Constitution;

(6) there is a need to both restrain the Federal Government in its overzealous regulation of the private sector and to protect private property, which is a fundamental right of the American people;

(7) the incremental, fact-specific approach that courts now are required to employ in the absence of adequate statutory language to vindicate property rights under the fifth amendment of the United States Constitution has been ineffective and costly and there is a need for Congress to clarify the law and provide an effective remedy;

(8) certain provisions of sections 1346 and 1402 and chapter 91 of title 28, United States Code (commonly known as the Tucker Act), that delineates the jurisdiction of courts hearing property rights claims, complicates the ability of a property owner to vindicate a property owner's right to just compensation for a governmental action that has caused a physical or regulatory taking;

(9) current law—

(A) forces a property owner to elect between equitable relief in the district court and monetary relief (the value of the property taken) in the United States Court of Federal Claims;

(B) is used to urge dismissal in the district court on the ground that the plaintiff should seek just compensation in the Court of Federal Claims; and

(C) is used to urge dismissal in the Court of Federal Claims on the ground that plaintiff should seek equitable relief in district court;

(10) property owners cannot fully vindicate property rights in one court;

(11) property owners should be able to fully recover for a taking of their private property in one court;

(12) certain provisions of section 1346 and 1402 and chapter 91 of title 28, United States Code (commonly known as the Tucker Act) should be amended, giving both the district courts of the United States and the Court of Federal Claims jurisdiction to hear all claims relating to property rights; and

(13) section 1500 of title 28, United States Code, which denies the Court of Federal Claims jurisdiction to entertain a suit which is pending in another court and made by the same plaintiff, should be repealed.

SEC. 3. PURPOSE.

The purpose of this Act is to—

(1) encourage, support, and promote the private ownership of property by ensuring the constitutional and legal protection of private property by the United States Government;

(2) establish a clear, uniform, and efficient judicial process whereby aggrieved property owners can obtain vindication of property rights guaranteed by the fifth amendment to the United States Constitution and this Act;

(3) amend certain provisions of the Tucker Act, including the repeal of section 1500 of title 28, United States Code;

(4) rectify the constitutional imbalance between the Federal Government and the States; and

(5) require the Federal Government to compensate property owners for the deprivation of property rights that result from State agencies' enforcement of federally mandated programs.

SEC. 4. DEFINITIONS.

For purposes of this Act the term—

(1) ''agency'' means a department, agency, independent agency, or instrumentality of the United States, including any military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the United States Government;

(2) ''agency action'' means any action or decision taken by an agency that—

(A) takes a property right; or

(B) unreasonably impedes the use of property or the exercise of property interests or significantly interferes with investment-backed expectations;

(3) ''just compensation''—

(A) means compensation equal to the full extent of a property owner's loss, including the fair market value of the private property taken and business losses arising from a taking, whether the taking is by physical occupation or through regulation, exaction, or other means; and

(B) shall include compounded interest calculated from the date of the taking until the date the United States tenders payment;

(4) ''owner'' means the owner or possessor of property or rights in property at the time the taking occurs, including when—

(A) the statute, regulation, rule, order, guideline, policy, or action is passed or promulgated; or

(B) the permit, license, authorization, or governmental permission is denied or suspended;

(5) ''private property'' or ''property'' means all property protected under the fifth amendment to the Constitution of the United States, any applicable Federal or State law, or this Act, and includes—

(A) real property, whether vested or unvested, including—

(i) estates in fee, life estates, estates for years, or otherwise;

(ii) inchoate interests in real property such as remainders and future interests;

(iii) personalty that is affixed to or appurtenant to real property;

(iv) easements;

(v) leaseholds;

(vi) recorded liens; and

(vii) contracts or other security interests in, or related to, real property;

(B) the right to use water or the right to receive water, including any recorded lines on such water right;

(C) rents, issues, and profits of land, including minerals, timber, fodder, crops, oil and gas, coal, or geothermal energy;

(D) property rights provided by, or memorialized in, a contract, except that such rights shall not be construed under this title to prevent the United States from prohibiting the formation of contracts deemed to harm the public welfare or to prevent the execution of contracts for—

(i) national security reasons; or

(ii) exigencies that present immediate or reasonably foreseeable threats or injuries to life or property;

(E) any interest defined as property under State law; or

(F) any interest understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest;

(6) ''State agency'' means any State department, agency, political subdivision, or instrumentality that—

(A) carries out or enforces a regulatory program required under Federal law;

(B) is delegated administrative or substantive responsibility under a Federal regulatory program; or

(C) receives Federal funds in connection with a regulatory program established by a State,

if the State enforcement of the regulatory program, or the receipt of Federal funds in connection with a regulatory program established by a state, is directly related to the taking of private property seeking to be vindicated under this Act; and

(7) ''taking of private property''—

(A) means any action whereby private property is directly taken as to require compensation under the fifth amendment to the United States Constitution or under this Act, including by physical invasion, regulation, exaction, condition, or other means; and

(B) shall not include—

(i) a condemnation action filed by the United States in an applicable court; or

(ii) an action filed by the United States relating to criminal forfeiture.

SEC. 5. COMPENSATION FOR TAKEN PROPERTY.

(a) IN GENERAL.—No agency or State agency, shall take private property except for public purpose and with just compensation to the property owner. A property owner shall receive just compensation if—

(1) as a consequence of a decision of any agency, or State agency, private property (whether all or in part) has been physically invaded or taken for public use without the consent of the owner; and

(2)(A) such action does not substantially advance the stated governmental interest to be achieved by the legislation or regulation on which the action is based;

(B) such action exacts the owner's constitutional or otherwise lawful right to use the property or a portion of such property as a condition for the granting of a permit, license, variance, or any other agency action without a rough proportionality between the stated need for the required dedication and the impact of the proposed use of the property;

(C) such action results in the property owner being deprived, either temporarily or permanently, of all or substantially all economically beneficial or productive use of the property or that part of the property affected by the action without a showing that such deprivation inheres in the title itself;

(D) such action diminishes the fair market value of the affected portion of the property which is the subject of the action by the lesser of—

(i) 20 percent or more with respect to the value immediately prior to the governmental action; or

(ii) $10,000, or more with respect to the value immediately prior to the governmental action; or

(E) under any other circumstance where a taking has occurred within the meaning of the fifth amendment of the United States Constitution.

(b) BURDEN OF PROOF.—(1) The Government shall bear the burden of proof in any action described under—

(A) subsection (a)(2)(A), with regard to showing the nexus between the stated governmental purpose of the governmental interest and the impact on the proposed use of private property;

(B) subsection (a)(2)(B), with regard to showing the proportionality between the exaction and the impact of the proposed use of the property; and

(C) subsection (a)(2)(C), with regard to showing that such deprivation of value inheres in the title to the property.

(2) The property owner shall have the burden of proof in any action described under subsection (a)(2)(D), with regard to establishing the diminution of value of property.

(c) COMPENSATION AND NUISANCE EXCEPTION TO PAYMENT OF JUST COMPENSATION.—(1) No compensation shall be required by this Act if the owner's use or proposed use of the property is a nuisance as commonly understood and defined by background principles of nuisance and property law, as understood within the State in which the property is situated, and to bar an award of damages under this Act, the United States shall have the burden of proof to establish that the use or proposed use of the property is a nuisance.

(2) Subject to paragraph (1), if an agency action directly takes property or a portion of property under subsection (a), compensation to the owner of the property that is affected by the action shall be either the greater of an amount equal to—

(A) the difference between—

(i) the fair market value of the property or portion of the property affected by agency action before such property became the subject of the specific government regulation; and

(ii) the fair market value of the property or portion of the property when such property becomes subject to the agency action; or

(B) business losses.

(d) TRANSFER OF PROPERTY INTEREST.—The United States shall take title to the property interest for which the United States pays a claim under this Act.

(e) SOURCE OF COMPENSATION.—The compensation referred to in this section shall be paid out of funds made available to the Federal agency or department by appropriation for the fiscal year in which the property deprivation referred to in this section occurred. If no such funds have been made available to the agency, such payment shall be made from the Judgment Fund.

SEC. 6. JURISDICTION AND JUDICIAL REVIEW.

(a) IN GENERAL.—A property owner may file a civil action under this Act to challenge the validity of any agency action that adversely affects the owner's interest in private property in either the United States District Court or the United States Court of Federal Claims. This section constitutes express waiver of the sovereign immunity of the United States. Notwithstanding any other provision of law and notwithstanding the issues involved, the relief sought, or the amount in controversy, each court shall have concurrent jurisdiction over both claims for monetary relief and claims seeking invalidation of any Act of Congress or any regulation of an agency as defined under this Act affecting private property rights. The plaintiff shall have the election of the court in which to file a claim for relief.

(b) STANDING.—Persons adversely affected by an agency action taken under this Act shall have standing to challenge and seek judicial review of that action.

(c) AMENDMENTS TO TITLE 28, UNITED STATES CODE.—(1) Section 1491(a) of title 28, United States Code, is amended—

(A) in paragraph (1) by amending the first sentence to read as follows: ''The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States for monetary relief founded either upon the Constitution or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, in cases not sounding in tort, or for invalidation of any Act of Congress or any regulation of an executive department that adversely affects private property rights in violation of the fifth amendment of the United States Constitution'';

(B) in paragraph (2) by inserting before the first sentence the following: ''In any case within its jurisdiction, the Court of Federal Claims shall have the power to grant injunctive and declaratory relief when appropriate.''; and

(C) by adding at the end thereof the following new paragraphs:

''(4) In cases otherwise within its jurisdiction, the Court of Federal Claims shall also have ancillary jurisdiction, concurrent with the courts designated in section 1346(b) of this title, to render judgment upon any related tort claim authorized under section 2674 of this title.

''(5) In proceedings within the jurisdiction of the Court of Federal Claims which constitute judicial review of agency action (rather than de novo proceedings), the provisions of section 706 of title 5 shall apply.''.

(2)(A) Section 1500 of title 28, United States Code, is repealed.

(B) The table of sections for chapter 91 of title 28, United States Code, is amended by striking out the item relating to section 1500.

SEC. 7. STATUTE OF LIMITATIONS.

The statute of limitations for actions brought under this title shall be 6 years from the date of the taking of property.

SEC. 8. ATTORNEYS' FEES AND COSTS.

The court, in issuing any final order in any action brought under this Act, shall award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing plaintiff.

SEC. 9. ALTERNATIVE DISPUTE RESOLUTION.

(a) IN GENERAL.—Either party to a dispute over a taking of property as defined under this Act or litigation commenced under this Act may elect to resolve the dispute through settlement or arbitration. In the administration of this section—

(1) such alternative dispute resolution may only be effectuated by the consent of all parties;

(2) arbitration procedures shall be in accordance with the alternative dispute resolution procedures established by the American Arbitration Association; and

(3) in no event shall arbitration be a condition precedent or an administrative procedure to be exhausted before the filing of a civil action under this Act.

(b) COMPENSATION AS A RESULT OF NEGOTIATED SETTLEMENTS OR ARBITRATION.—The funds used for compensation to the owner (as determined by the appropriate official of the Federal agency or department) shall be taken from the responsible agency's budget for that fiscal year or transferred to the

agency from the Judgment Fund for payment to the owner.

(c) REVIEW OF ARBITRATION.—Appeal from arbitration decisions shall be to the United States District Court or the United States Court of Federal Claims in the manner prescribed by law for the claim under this Act.

(d) PAYMENT OF CERTAIN COMPENSATION.—In any appeal under subsection (c) in which the court does not rule for the Federal agency or department, the amount of the award of compensation determined by the arbitrator shall be paid from funds made available to the Federal agency or department by appropriation in lieu of being paid from the Judgment Fund, except that if no such funds have been made available to the agency or department such payment shall be made from the Judgment Fund.

SEC. 10. RULES OF CONSTRUCTION.

Nothing in this Act shall be construed to interfere with the authority of any State to create additional property rights.

SEC. 11. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.

SEC. 12. EFFECTIVE DATE.

The provisions of this Act and amendments made by this Act shall take effect on January 1, 1995 and shall apply to any agency action that occurs on or after such date. ●

BITTER FRUIT OF THE ASIAN IMMIGRATION CASES

● Mr. SIMON. Mr. President, in an unusual publication called simply ''Constitution,'' published by the Foundation for the United States Constitution, there is an article by Professor Harold Hongju Koh of Yale University titled, ''Bitter Fruit of the Asian Immigration Cases.''

It interested me because of my long association with the cause of civil rights and because I grew up in the State of Oregon and recall the criticism my father took when, as a Lutheran minister, he objected to the 1942 unconstitutional transfer of Japanese American citizens away from the West Coast. Another reason for my interest is that I serve on the Senate Judiciary's Subcommittee on Immigration and Refugee Affairs.

Our record in the field of immigration has not always been a good one, and that is particularly true as it applies to the Asian community.

There is no question that we face problems in the field of immigration, but the answer is not passing things like Proposition 187 in California or the other abuses that we have tolerated through the history of our country.

I believe my colleagues will find the article by Professor Koh a matter of more than casual interest.

At this point, I ask that it be printed in the RECORD.

The article follows:

BITTER FRUIT OF THE ASIAN IMMIGRATION CASES

(By Harold Hongju Koh)

Schoolchildren everywhere can recite the Statue of Liberty's inspirational message about ''huddled masses, yearning to breathe free.'' Yet history shows that our national attitude toward immigrants has been as hostile as it has been solicitious—especially in hard times. One need only look at today's headlines. As we endure our latest recession, newspapers report polls showing that 60 percent of Americans believe current levels of immigration are too high. News stories tell of the government's harsh policies toward Haitian and Chinese refugees, of public concern over the illicit smuggling of aliens, of anti-immigrant sentiment spurred by the World Trade Center bombing, and of lawsuits brought by California, Texas and Florida against the federal government to recoup costs arising from the influx of undocumented aliens. Politicians, says the New York *Times,* call for ''a get-tough effort to control immigration . . . prompted by polls showing that the issue is gaining an importance among voters . . . increasingly worried about the economic impact of immigrants and their effect on American culture.''

Not only is immigrant bashing as American as apple pie, but bias against immigrants has helped shape our constitutional law. Occasionally, the bias has been overt: a proposed constitutional amendment, for example, (favored, apparently, by 49 percent of Americans) would deny citizenship to the American-born children of undocumented aliens. And ''reforms'' that hurt immigrants have emerged as themes embroidered on Supreme Court decisions. It has been a long time since Justice Harry Blackmun led a unanimous Supreme Court to declare that ''aliens as a class are a prime example of a discrete and insular minority . . . for whom . . . heightened judicial solicitude is appropriate'' *Graham* v. *Richardson,* 1971). His last major immigration opinion *Sale v. Haitian Centers Council,* 1993) was a solitary dissent decrying the summary return of Haitian refugees to a brutal dictatorship without first granting them a hearing. In his dissent, Blackmun laid bare the themes that run through the modern Court's immigration and naturalization jurisprudence: an obsession with sovereignty and governmental power, an unwillingness to scrutinize the immigration decisions of government officials, contempt for international law and indifference to the due process and equal protection claims of foreigners seeking entry to the United States.

Where and when did these attitudes originate? The latest volume of the Oliver Wendell Holmes Devise: History of the Supreme Court, Owen Fiss's impressive Troubled Beginnings of the Modern State, 1888–1910, illuminates a source: a series of Asian immigration cases decided by the Court in the late 19th century. Before these cases, immigration into the United States went virtually unregulated, driven by the perceived need to remedy underpopulation. Indeed, the Declaration of Independence assailed the King of England for ''endeavor[ing] to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization of Foreigners; [and] refusing to pass others to encourage their Migrations hither. . . .'' The Constitution's framers responded with the fourth clause of Article I, Section 8, which granted Congress power to ''establish an uniform Rule of Naturalization.'' In 1790 Congress invoked new power to pass a law permitting only ''free white persons'' to naturalize, a right not granted to Asian immigrants until 1952.

Significantly, this language did not authorize Congress to regulate the admission of aliens who might seek citizenship. In fact, another clause of Article I forbade Congress to prohibit the ''Migration or Importation of such Persons as any of the States now existing shall think proper to admit'' before 1808. Designed to protect the slave trade, the clause was invoked by Jeffersonians to challenge the constitutionality of the Alien Act of 1798, which authorized the President to expel ''all such aliens as he shall judge dangerous to the peace and safety of the United States.''

During the years of free immigration few Asians came to these shores. Between 1820, when immigration records were first kept, and 1849, when the California Gold Rush began, only 43 Chinese were reported to have arrived in America. But once gold was discovered, thousands of Chinese miners flooded into ''Kumshan''—the Golden Moutain—as they called California. In 1850, 4,000 Chinese arrived in California. The next year the Chinese population stood at 25,000; in 1852, 45,000. These immigrants—mostly men who had left their families in China—came to work the mines. But by the mid-1860s, thousands had depleted their mining claims or been forced off them. They found work on the western slopes of the Sierra Nevada, building the Central Pacific Railroad; in one year the company procured 15,000 laborers. Other Chinese opened laundries, restaurants and small shops, or worked as gardeners, domestic servants, farmers, fishermen, mechanics and artisans. By the mid-1870s, some 115,000 Chinese lived in the United States, 70 percent in California, where one person in 10 was Chinese.

The first Chinese were welcomed with curiosity. In 1852 the governor of California claimed he wanted ''further immigration and settlement of the Chinese—one of the most worthy classes of our newly adopted citizens.'' But by the 1860s hospitality had soured. White workers assailed the Chinese for working too hard for too little, while the popular press vilified them as lairs, criminals, prostitutes and opium addicts.

Unlike the European immigrants then flooding into the United States, the Chinese were thought unassimilable. In Justice Stephen Field's works, ''they remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. As they grew in numbers each year, the people of the [West] coast saw, or believed they saw . . . great danger that at no distant day that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration.'' When drought and depression hit California in the early 1860s, the Chinese were scapegoated. ''To an American,'' the 1876 manifesto of the Workingmen's Party of California declared, ''death is preferable to life on a par with the Chinaman.''

California and its cities began to enact restrictive laws. The first were revenue measures (such as entry, license and occupation taxes) and other laws neutral on their face but applied harshly against the Chinese. Chinese paid 98 percent of the monies collected under the California Foreign Miner's Tax, for example, and an 1870 law authorizing the state's immigration commissioner to remove ''debauched women'' was quickly applied to Chinese women arriving by ship. Soon the laws became overtly racist; a San Francisco ordinance required all Chinese residents to move to prescribed ghettoes, and another humiliated Chinese prisoners in the county jail by requiring them to cut their queues to one inch in length. Between 1855 and 1870 California passed acts bearing such titles as ''An Act to Discourage the Immigration to This State of Persons Who Cannot Become Citizens,'' ''An Act to Protect Free White Labor Against Competition with Chinese Coolie Labor'' and ''An Act to Prevent the Further Immigration of Chinese or Mongolians to This State.'' Chinese were denied the vote and the rights to own or inherit land, to testify in court, to attend public schools with